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JURISDICTION

The decision of the Court of Appeals was entered on February 16, 1954 (P. 6-19), and its decree on March 17, 1954 (P. 20). Petitioner's petition for rehearing and the Board's motion for clarification of the opinion were denied on March 9 (P. 35, 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Does Section 8(d) of the National Labor Relations Act prohibit any strike during the life of a collective bargaining agreement, even though the agreement provides for reopening with the right to strike, and even though the 60-days' notice required by Section 8(d) is given?

2. When an employer is charged with an unfair labor practice, under Section 8(a)(1) and (3) of the Act, for refusal to reinstate unreplaced strikers after a strike—

(a) is it a valid defense that the employer believed that the strikers had engaged in misconduct;

(b) must the Board show that the denial of reinstatement was "for the purpose of discouraging membership in the union"?

3. Does a trial examiner's uniform acceptance of the testimony for the strikers and uniform rejection of the testimony for the employer prove his "bias and hostility" and vitiate his findings?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, p. 26

STATEMENT

Petitioner is Local No. 3 of the United Packinghouse Workers of America, CIO. Petitioner's members are employed at the Cedar Rapids, Iowa, plant of Wilson & Co.,

Inc. (hereafter referred to as the Company). Other locals of the United Packinghouse Workers of America, CIO (hereafter referred to as the International), i.e., Locals Nos. 6 and 37, are made up of members employed at the Company's Albert Lea and Faribault, Minnesota, plants.

The contract—On December 20, 1946, the Company and the International, the latter acting on behalf of its local unions, entered into a collective bargaining agreement covering seven of the Company's plants, including those at Cedar Rapids, Albert Lea and Faribault (R. 86; App. 1027-1049). This contract was to run until August 11, 1948, and from year to year thereafter (R. 86; App. 1049). It contained a provision permitting reopening by either party, once before August 11, 1947, and once between that date and August 11, 1948, on 30-days' written notice and "solely on the issue of general wages" (R. 86; App. 1047). The contract did not contain a no-strike clause, and by exchange of letters on December 26, 1946, the parties confirmed their understanding that on a reopening on wages "the Union has the right to strike and the Company has the right to lock out" (App. 991).

The strike—On December 19, 1947, the International notified the Company in writing that it reopened the contract, in accordance with its terms, on the question of general wage increases (App. 1055-1056). The notice also stated that it was given pursuant to Section 8(d) of the National Labor Relations Act.

Wage negotiations reached an impasse and a strike commenced on March 16, 1948 (App. 629). On June 6, 1948, the locals concerned voted to end the strike, and the strikers reported for work on June 7, 1948 (R. 87, 96; App. 331, 647, 891-892, 992). The Company refused to reinstate some of the strikers, even though they had not been replaced during the strike.

The Board proceedings—Charges having been filed with the National Labor Relations Board by Petitioner (R.

The Court's discussion of Section 8(d) comes only after a lengthy discussion of other possible grounds for decision, and it is not possible to state that the 8(d) holding is, without doubt, the sole holding of the Court. That such is the case, however, is indicated by the fact that, after discussing the other issues, the Court begins its discussion of the 8(d) issue by saying: "However, it is urged by the company that the Board was without jurisdiction in the matter . . ." (P. 16). Further, after it reaches its conclusion as to Section 8(d), the Court says:

> "As this disposes of the issues raised by the petition for review filed by the union, as well as the questions raised by the petition for review filed by the company, we pretermit a consideration of other contentions urged by the respective petitioners." (p. 19).

Earlier in the opinion, in discussing the contentions later to be pretermitted, the Court appears to declare that the findings of the Board and the Trial examiner, that the 31 employees were discharged or denied reinstatement for participating in the strike or other protected union activity, are not supported by substantial evidence (P. 15). The court reaches this conclusion by way of the following propositions:

(1) Proof that the Company refused to reinstate strikers, even though they had not been replaced, was not sufficient to make out a *prima facie* case of illegal discrimination (P. 11-12).

(2) It is a sufficient defense that "the company had reasonable grounds to believe" that the strikers had engaged in misconduct and "in reliance upon such belief refused to reinstate them." (P. 15).

(3) "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer * * * convinces us of his bias and hostility." (P. 12). It "goes far to weaken or destroy the pre-

sumption of correctness usually attributed to the findings of the trier of facts"[4] (P. 13).

Petitioner's petition for rehearing, filed on March 2, 1954 (P. 21-34), and the Board's motion for clarification of the opinion, filed on March 8 (P. 35-37), were denied on March 9 (P. 35, 37).

REASONS FOR GRANTING THE WRIT

Introduction

As stated, we believe that the decision of the Court below is based solely on Section 8(d) of the Act. It is possible, we concede, to read the opinions also resting on other grounds. We believe that on either hypothesis issues are presented which warrant review by this Court. In the discussion below we will present our reasons for believing why, on any reading of the opinion, certiorari should be granted.

I

Section 8(d) of the National Labor Relations Act defines the duty to bargain collectively under that Act. It provides, among other things, that where a collective bargaining contract is in effect, no party thereto shall terminate or modify it unless such party

> "(1) serves a written notice upon the other party to the contract of the proposed termination or modifica-

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[4] The Court demonstrated its own freedom from bias and hostility by assuming, without detailed examination, that the Company's testimony was true and that of the strikers false, and by asserting, in disregard of the record and contrary to the facts, that "it was necessary for the governors of the states where the plants are located to call out the militia of the respective states to quell mob violence * * *." (P. 14). The only thing in the Record bearing on this assertion is an offer by the Company to prove that the Governor of Minnesota ordered the National Guard to Albert Lea, Minnesota, during the strike (App. 875). The offer was rejected, presumably because it was not proposed to relate the proof to any of the discharged strikers (Id.). The Record contains no reference to any calling out of militia at Cedar Rapids or at Faribault, and no troops were in fact called out at those places.

tion sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;"

* * * *

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * * *"

Section 8(d) further provides that

"Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The Court below held that the words "whichever occurs later" in Section 8(d)(4) bar a strike for the duration of a collective bargaining contract, even though the contract provides for reopening with the right to strike, and even though the 60 days' notice required by Section 8(d) is given. And it further held that under the last quoted portion of Section 8(d) the strikers lost their status as employees and were subject to discharge.

This holding that Section 8(d) prohibits any strike during the life of a contract, even one which provides for reopening with the right to strike, presents an issue which warrants review by this Court. This issue affects the right to strike under more than half of the collective bargaining contracts, covering millions of workers, now in effect in this country. It affects the willingness of unions to negotiate long term contracts, and contracts are being negotiated every day. Its prompt resolution by this Court would, therefore, be in the public interest. Further, the

interpretation given the statute by the Court below is probably erroneous. It overturns the Board's settled construction of the statute, which has been acquiesced in by Congress and relied upon in the negotiation of thousands of collective bargaining agreements; and it rejects a reasonable construction of the statute in favor of one which is both unreasonable and detrimental to stable labor relations.

1. *The issue is of major importance*—The decision below in effect writes into every collective bargaining agreement a no-strike clause for the duration of the agreement. The available data indicates that more than half of the collective bargaining agreements now in effect in this country do not unconditionally bar all strikes for their duration: all of these agreements are affected by the issue posed in this case.

An analysis by the Bureau of Labor Statistics, Department of Labor, of 2,578 contracts in effect during 1951 and 1952, covering more than 5,750,000 workers, reveals that only 32 percent of the agreements contained "an absolute ban on strikes and lock-outs during the term of the contract", while 56 percent conditionally restricted the right to strike. Monthly Labor Review, Vol. 74, pp. 272-275 (March, 1952). This 56 percent included contracts, like that involved here, permitting a strike "in event of deadlock over wage reopening or other specified issues", contracts permitting a strike after exhaustion of the grievance procedure, etc. The remainder of the contracts —12 percent—contained no restriction on the right to strike.

A January, 1954 survey of 400 contracts by the Bureau of National Affairs shows that 39 percent of the contracts contain an absolute ban upon strikes for the duration of the contract; that 50 percent conditionally restrict the right to strike, with most of these contracts permitting a strike on a wage reopening; and that about 11 percent con-

tain no restriction on the right to strike.[5] This study adds:

> "These figures show a moderate gain in conditional pledges at the expense of absolute bans. However, analysis of the clauses indicates that this follows from the fact that contracts generally tend to be drafted for longer terms—longer terms mean more wage reopenings and wage reopenings are almost always accompanied by provision for suspending strike bans in the event of a deadlock in negotiations. In other words, the increase in conditional strike pledges does not represent a trend toward instability in contracts. Instead it follows from the trend toward longer, more stable contracts with only limited opportunity for renegotiation during their terms." (p. 15:325)

It therefore appears that some 50 to 55 percent of the collective bargaining contracts permit strikes in some circumstances, such as a deadlock in negotiations on a wage reopening, and that another 10 or 12 percent do not restrict the right to strike during the life of the contract. The decision below interprets the Act as writing an unconditional no-strike clause into all of these contracts. Thus, what is at stake here is the right to strike under considerably more than half of the collective bargaining agreements now outstanding in the country. According to our best estimate, these contracts cover more than eight million workers.[6]

Further, new contracts are being negotiated daily, and unions cannot safely ignore the decision below. While it

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[5] The statistics in this paragraph are taken from pp. 15:325-15:326 of the loose-leaf service on "Collective Bargaining Negotiations and Contracts" published by the Bureau of National Affairs (Washington, D. C.).

[6] The Bureau of Labor Statistics, Department of Labor, states that no estimates are available as to the number of workers in the United States covered by collective bargaining agreements.

Total union membership in the United States was estimated, for 1952, at around 16 million. (Directory of Labor Unions in the United States, 1953, Bulletin No. 1127, Bureau of Labor Statistics, Department of Labor.)

stands, unions will be under strong impulsion to negotiate short term contracts, instead of longer term contracts with a wage reopening and the right to strike. Such a development would, as shown below, make for less stable labor relations.

The importance of this issue to the workers, unions, and employers involved, and to the general public, warrants, we submit, its review by this Court. A conflict of decisions among the courts of appeals might be several years in developing. To leave the issue unsettled over such a period of time would create chaos and uncertainty, and promote industrial strife.

2. *The decision below is probably incorrect*—The Court's interpretation of Section 8(d) as barring a strike for the duration of a contract, even one specifically reserving the right to strike, rests on the words "whichever occurs later" in Section 8(d)(4). Admittedly this phrase is susceptible of the interpretation given it by the Court below: that is the literal interpretation. The phrase can, however, also be understood as applying only to situations in which the notice to modify a contract is given *less* than 60 days before the expiration date of the contract. Further, Section 8(d)(4) as construed by the Court below is inconsistent with the final portion of 8(d), which penalizes employees only for "a strike within the sixty-day period" and does not refer to the expiration date of the contract at all. It is this final portion of Section 8(d) on which the decision below actually turned: the Court below held that under it the strikers lost their status as employees and so were subject to discharge. Thus, the decision below does not rest on a literal reading of the statute, but on importing into the final portion of 8(d) the

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The number of workers covered by collective bargaining agreements in this country is probably around that figure, or perhaps a bit higher.

It thus seems a safe estimate that something in excess of 8 million workers are covered by contracts, the right to strike under which is affected by the issue in this case.

restrictions on the right to strike found, if at all, only in Section 8(d)(4).

Other reasons for believing that the decision below is probably erroneous, in addition to those already indicated, are as follows:

(1) The interpretation given the statute by the Court below runs counter to the legislative history. During the debate on overriding the President's veto, Senator Taft said (93 Cong. Rec. 7530):

> "I think ours is a very mild provision, which merely says to unions, 'You must have a 60-day reopening clause in your contract'."

See also his statement during the Senate debate, quoted in footnote 7, below.

(2) The decision overturns the Board's settled construction of the statute. In *United Packinghouse Workers of America, CIO, and Wilson & Co.*, 89 NLRB 310 (1950), an earlier case involving the Company and the International, the Board, after a full exploration of the legislative history, to avoid a conflict between Section 8(d)(4) and the final proviso to Section 8(d), and in the light of the relevant policy considerations, held that the phrase "whichever occurs later" was intended only to apply to situations in which notice to modify a contract is given *less* than 60 days before the termination of the contract.[7] The Board said (p. 313-314):

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[7] In support of this conclusion the Board quoted (89 NLRB at 316) the following statement by Senator Taft during the debate on the Senate floor (93 Cong. Rec. 3839):

"We have provided in the revision of the collective bargaining procedure, in connection with the mediation process, that before the end of the contract, whether it contains such a provision or not, either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining, and time for the intervention of the Mediation Service. *If such notice is given, the bill provides for no waiting except during the life of the contract itself. If, however, either party neglects to give such notice and waits, let us say, until 30 days before the end of the contract to give the notice, then there is a waiting period provided during*

"If Section 8(d)(4) is read so as to prohibit a strike for modification of a contract until that contract expires the concept of contract modification is rendered almost meaningless, and the Act will have destroyed the effectiveness of provisions contained in hundreds of collective bargaining agreements whereby the parties have agreed to consider wage and similar adjustments during the term of the agreement, and, in the absence of a no-strike clause, have further recognized that demands made pursuant to reopening clauses may be supported by the traditional modes of economic pressure. *Such a result would constitute a serious deterrent to the execution of collective bargaining agreements of any substantial duration, and would thereby remove a most important encouragement to stability in industrial relations.*" [Italics supplied.]

(3) Congress agrees with and has acquiesced in the construction given Section 8(d) by the Board in the *United Packinghouse Workers* case.

Congress was familiar with this issue as early as 1948. The final (December, 1948) report of the Joint Committee on Labor-Management Relations, created by Section 401 of the Taft-Hartley Act, discusses it at length. (Rept. 986, 80th Cong., 2nd Sess., pp. 6, 62-63.) The Joint Committee had a Republican majority, with Senator Ball as chairman. After posing the problem of statutory interpretation the Committee report states (p. 62):

"Reading section 8(d) as a whole seems to lead to the conclusion that the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages. Use of the words 'or modify' and 'or modification' in the proviso, and use of 'or modification' in section 8(d)(1), and the statement in the final paragraph of the section that the

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which the strike is an unlawful labor practice for 60 days from that time, or to the end of the contract and 30 days beyond that time." [Italics supplied]

> parties are not required to agree to any modification effective before the contract may be reopened under its terms, all seem to contemplate the right of either party to insist on changes in the contract if they have so provided. The right of the union would be an empty one without the right to strike after a 60-day notice."

The report then notes that the issue is before the Board in the *United Packinghouse Workers* case, but that a decision in this case will take some time. The report continues (p. 63):

> "Since the words of the statute are susceptible to opposing interpretation, and it is a matter of extreme importance to both management and labor (it should be noted that the section applies likewise to employers in prohibiting a lock-out), the committee recommends to Congress that the intent be clarified."

After proposing specific language, this portion of the report concludes (p. 63):

> "The committee has noted an increasing demand by labor organizations for short-term contracts, and for contract provisions permitting the right to cancel the entire contract on a 60-day notice, with the stated reason being the questionable nature of the right to strike during a contract term. In order that the parties may better know their rights in the matter, the committee recommends the adoption of the amendments which would permit a strike or lock-out after a 60-day notice in support of demands they have anticipated in a reopening clause."

See also the report later filed by minority members of the Joint Committee: Report No. 374, 81st Cong., 1st Sess., pp. 45-46.

During the next year, 1949, the question of Taft-Hartley revision was extensively considered in the Congress. During that Congress (81st Cong., 1st Sess.) both the Senate

Labor and Public Welfare Committee and the House Education and Labor Committee had Democratic majorities, and the bills reported out by the Committee majorities (S. 249 in the Senate, and H.R. 2032 in the House) proposed to repeal Section 8(d) in its entirety, thus disposing incidentally of the issue here involved.

The Republican minority in the Senate Committee, headed by Senator Taft, repeated the proposal made by the Joint Committee the year before: that Section 8(d) be amended to make it clear, in line with the original intent of Congress, that it does not prohibit a strike during the life of a contract pursuant to a contract reopening. See Rept. 99, Pt. 2, 81st Cong., 1st Sess., P. 27. This proposal was at different times accepted by both the Senate and the House, though ultimately no new act was passed. The Taft bill, which passed the Senate that year—S. 249, 81st Cong., 1st Sess.—contained such a provision. See Section 8(d)(4), p. 20. So did the Wood bill, which passed the House but was later recommitted. H.R. 2238, 81st Cong., 1st Sess., Section 8(d)(4), p. 20.

The Board handed down its decision in *United Packinghouse Workers* on April 12, 1950, and the interpretation there given the statute is fully discussed in its 15th Annual Report for the Fiscal Year 1950, at pages 136-137. Since the Board decision, the Congress has indicated no further interest in the issue: neither Democrats nor Republicans have proposed any revision, as respects this issue, of Section 8(d). The only inference which can rationally be drawn is that the Congress, with a unanimity virtually unknown in this controversial field, has been entirely satisfied with the Board's construction of the statute.

In 1951, the Congress amended the National Labor Relations Act in some respects (P. L. 189, 82nd Cong., 1st Sess.), but it did not amend, or consider amending, Section 8(d).

During the current (1954) session of Congress the Re-

publican majority of the Senate Labor and Public Welfare Committee expressed dissatisfaction with certain interpretations which the Board has given to Section 8(d), and reported out a bill, S. 2650 (later recommitted by the Senate), which would, *inter alia*, have amended Section 8(d) to overrule these interpretations. The Committee's complaint, however, was solely about the so-called *Allied Mills* (82 NLRB 854) doctrine—the doctrine that, even in the absence of a reopening clause, the duty to bargain collectively includes the obligation to discuss, during the life of a contract, matters not covered by the contract. See Senate Rept. 1211, 83rd Cong., 2nd Sess., p. 13. The Committee did not discuss the Board's doctrine that Section 8(d) does not invalidate strikes pursuant to reopening clauses, and its amendment did not touch that point.

(4) The Board's interpretation of Section 8(d) has been relied upon by unions in the negotiation of thousands of collective bargaining agreements. Long term contracts with wage reopenings and the right to strike are an alternative to short term contracts. During the period before the Board's decision in *United Packinghouse Workers*, unions were, so the Joint Committee stated, turning to short term contracts. (See *supra* p. 14) That was one reason why that Committee proposed to clarify the Act to make clear the validity of strikes under wage reopenings.

Since the Board's decision, unions have, as the Bureau of National Affairs survey recites (*supra*, p. 10) turned more and more to long term contracts with reopening clauses and the right to strike. Obviously, unions would not have negotiated these contracts but for the Board's interpretation upholding the right to strike. As the Joint Committee said (*supra*, p. 14), "The right of the union [i.e., to reopen] would be an empty one without the right to strike after a 60-day notice." To deprive unions now of the *quid pro quo*—the right to strike on a contract reopening—

which induced them to bind their members by long term contracts, would be most unjust.

(5) Finally, as pointed out by the Joint Committee, the Board, and the Bureau of National Affairs (see *supra*, pp. 10, 13, and 14) long term contracts with limited wage reopenings and the right to strike minimize the likelihood of strikes, as compared with short term contracts. The decision below, by invalidating such contracts and forcing unions to turn to short term contracts, will, if it stands, tend to increase the number of strikes and impair industrial peace. It is not only inconceivable that Congress could have intended such a result; it is clear as a matter of history that it did not.

II

The holding, if it be a holding, of the Court below, that, on the evidence, the strikers, were not entitled to reinstatement, rests on two interrelating propositions.[8] They are (1) that it is a sufficient defense for the Company that it had "reasonable grounds to believe" that the strikers had engaged in misconduct, and "in reliance upon such belief refused to reinstate them" (P. 15)[9], and (2) that proof that the Company refused to reinstate strikers, even though they had not been replaced, was not sufficient to make out a case of illegal discrimination. It was necessary in addition that the Board "affirmatively" show that

[8] This holding probably rests also on various other interrelated propositions or assumptions, such as the Court's assertion, discussed *infra*, pp. 24-25, that the trial examiner's uniform rejection of the Company's testimony showed bias and hostility, thereby discrediting his findings, and entitling the Court to weigh the evidence independently. The fact that the Court's ultimate holding that, on the evidence, the strikers were not entitled to reinstatement, is arrived at through the intermingling and entangling of a number of different postulates should not dissuade this Court from reviewing the case. For that would mean that the lower courts can avoid Supreme Court review if only their decisions are sufficiently obscure.

[9] The Court at this point quoted from its earlier decision in *NLRB* v. *Stafford*, 206 F. 2d 19, 22 as follows:

> "The fact in issue is the intent, motive or reason in respondents' mind for the discharge of the complainants."

the denial of reinstatement to returning strikers was "for the purpose of discouraging membership in the Union" (P. 12, 15).

On both of these points, the decision below is in conflict with decisions of other courts of appeals. In addition it conflicts in principle with the recent decision of this Court in *Radio Officers' Union* v. *NLRB*, 347 U. S. 17. Further, the practical effect of the decision below is to deny to strikers any protection against unlawful discharge, by, on the one hand, providing employers with a subjective, easily asserted defense; and, on the other, imposing on the Board a burden of proof virtually impossible for it to meet.

1. The assertion of the Court below that the strikers "were not entitled to reinstatement" because "the company had reasonable grounds to believe" that they had engaged in misconduct (P. 15) is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *NLRB* v. *Industrial Cotton Mills*, 208 F. 2d 87, certiorari denied April 5, 1954, No. 582, October term, 1953. In that case, the question, as stated by the Court of Appeals, was (p. 90):

> "* * * whether the Board has the power to order the reinstatement of Stallings when his employer has refused reinstatement to him after the strike on account of the employer's honest but mistaken belief that Stallings had been guilty of *strike misconduct*."

The Court held that the Board had the power to order reinstatement of the striker, notwithstanding the employer's good faith belief, when it refused him reinstatement, that the striker had been guilty of misconduct. The Court said (p. 91):

> "The law is quite clear that * * * the refusal of an employer to reinstate a striker, whose place has not been filled, constitutes a violation of Section 8(a)(1) and (3), and equally clear is the right of the employer

> to refuse reinstatement when the striker has actually been guilty of serious strike misconduct.
> * * * * *
>
> "As we view the situation, the statutory protection extended to a blameless employee is a firm and clear guarantee, not one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information. Nor does the Act expose the innocent employee to the hazard of his employer's mistake where the consequence of this mistake is to divest the employee of a right guaranteed by the Act."

The decision below also conflicts with the similar decision of the Court of Appeals for the Third Circuit in *Cusano* v. *NLRB*, 190 F. 2d 898, where the Court said (p. 902):

> "It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. * * * This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. The right of a union official or representative to inform his fellow employees of the proceedings at the Board's regional office is certainly one of the activities so protected. To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind."

2. The statement of the Court below, that the Board must "affirmatively" show that the denial of reinstatement to returning strikers was "for the purpose of discouraging membership in the union" (P. 12, 15), is in direct conflict with the decisions of the Courts of Appeals for the Third and Fourth Circuits in the cases just discussed, and conflicts in principle with the recent decision of this Court in *Radio Officers' Union* v. *NLRB*, 347 U. S. 17.

This point is closely related to that just discussed. In the view of the Court below, a refusal to reinstate unre-

(2) With but one or two exceptions, none of the strikers who were denied reinstatement were told by the Company the reason for the denial. Some were even led to believe that they might still be recalled in the future (App. 46, 96-97, 121-123, 139-140, 186, 198, 212, 220-221, 234, 244-245, 485, 561, 631-632, 674, 684, 694, 700, 709-710, 718-719, 749-750, 894, 906, 914, 925).

(3) Two employees (Spiker and Roman) were invited by the Company, ten days after the incident alleged to have been the reason for discharge, to return to work *during the strike* (App. 228, 231-232, 609, 991; Bd. App. 6), but were denied reinstatement after the termination of the strike (App. 139, 227).

(4) The Company at no time made any effort to determine from the accused employees their version of the facts with respect to the incidents of alleged misconduct. (See record citations under "(2)" above; also App. 219, 225, 232, 241, 563). In this connection, many of the discharged employees were persons with service with the Company for periods as long as 25 years (Ulman, App. 693), 23 years (Trachta, App. 233), 19 years (Piper, App. 893), 18 years (the Scurlocks, App. 181, 242), 15 years (Feuerhelm and Flanagan, App. 628, 716), 12 years (Spiker and Unash, App. 226, 197), 11 years (Dye, App. 44), etc.

(5) The defense of alleged strike misconduct was not put forward in the answer originally filed by the Company

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267), one was a representative of the International Union (App. 251), and four others were union stewards (App. 139, 169, 182, 222). The sixteenth employee ordered reinstated at Cedar Rapids was a union steward discharged for actions connected with a controversy over presentation of a grievance (App. 303-304, 306-311).

The ten employees denied reinstatement at the Albert Lea plant at the close of the strike include (1) the Vice President (App. 716-717), (2) a man who had served the year before as Secretary and departmental chief steward (App. 694), (3) the Public Relations Officer (App. 645) of the local union, (4) the chairman of the local strike committee (App. 674), (5) the Chief Plant Steward (App. 700), (6) a departmental chief steward who was also a member of the national and local bargaining committees (App. 682-683), and (7) a union steward (App. 660).

to the Board's complaint (General Counsel's Exhibit 5A; App. 27). The Company relied, rather, on its claim that the strike was illegal under Section 8(d). The Company's answer was not amended to assert strike misconduct until the second day of the hearing, and then with no specification as to the nature and time of the alleged acts of the individual employees (Respondent's Exhibit 3; App. 72-74).

It is too much to hope that in this kind of a case company officials will take the stand and testify that they discharged employees for participation in a lawful strike. Short of that, it is not perceived how a case of discriminatory discharge could ever be proved to the satisfaction of the Court below.

III

The statement of the Court below that the trial examiner's uniform acceptance of the testimony for the strikers and rejection of the testimony for the Company establishes invalidating bias on his part is contrary to the decision of this Court in *NLRB* v. *Pittsburgh S. S. Co.*, 337 U. S. 656.

The Court below said it was convinced of the trial examiner's "bias and hostility" because of:

> "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances * * *." (P. 12).[12]

[12] The Court's only specific complaint (P. 13-14) about the trial examiner's findings or rulings was that he had rejected affidavits which the Company offered to show misconduct on the part of the strikers. The trial examiner evidently rejected these affidavits because he was not convinced that the Company had made a real effort to secure the personal attendance of the affiants (App. 591-598). This ruling appears to have been well within the examiner's discretion.

This "prejudice, bias and hostility," the Court said, "goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts" (P. 13). The Court apparently felt free, therefore, to weigh the evidence for itself and to disregard the examiner's findings, which had, except as to one discharged employee, been sustained by the Board.

The viewpoint of the Court below in this respect precisely parallels that of the lower court in the *Pittsburgh S. S. Co.* case, which this Court reversed. This Court said (337 U. S. at 659):

> "*First:* We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant."

And the Court quoted with approval from the decision of Judge Hutcheson in *NLRB* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800, in part as follows:

> "'The fact alone * * * of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair.'"

This Court's second decision in *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, in which it refused again to reverse the lower court because the lower court, in its second look at the case, "had painstakingly reviewed the record," merely confirms the error of the Court below in failing to review the record and relying instead on the claimed bias of the examiner.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *.

* * * * *

Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incor-

porating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representa-

tive of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

FILED
JUL 3 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 124

LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO,

Petitioner,

vs.

WILSON & CO., INC., A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT, WILSON & CO., INC., IN OPPOSITION TO THE PETITION.

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OPINION BELOW.

The opinion of the Court of Appeals is reported at 210 F. (2d) 325 and appears in the printed proceedings herein at pages 6-19.[1]

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1. References hereafter will be abbreviated as follows: "R." for "Record"; "P." for "Proceedings"; "App." for "Appendix to Petitioners' Briefs"; and "Pet." for "Petition for Writ of Certiorari."

JURISDICTION.

The Court of Appeals rendered its decision on February 16, 1954 (P. 6-19). A petition for rehearing was denied March 9, 1954 (P. 35) and the decree of the Court was entered on March 17, 1954 (P. 20). The petition for a writ of certiorari was filed June 8, 1954. Petitioner erroneously seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1) and Section 10(e) of the Labor Management Relations Act, as amended.

STATUTE INVOLVED.

The pertinent provisions of the Labor Management Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Section 151 *et seq.*), hereinafter called the Act, are set forth in the Appendix to this Brief, *infra*, pages 19 to 23.

QUESTIONS PRESENTED.

The alleged questions presented, as specified by petitioner (Pet. 2), are hereinafter discussed under the heading "Argument". The basic question which must first be considered by this Court is whether petitioner, a labor union, has standing to seek review by this Court of the decision and decree of the Court below denying enforcement of a National Labor Relations Board order, when the Board, the agency charged by Congress with the enforcement of the Labor Management Relations Act, has elected not to petition for a writ of certiorari with respect to such decision and decree.

STATEMENT OF THE CASE.

Background of Proceedings.

On December 20, 1946, respondent, Wilson & Co., Inc. (hereafter called "the Company") and the United Packinghouse Workers of America, CIO (hereafter called "the International") entered into a collective bargaining agreement covering employees at seven of the Company's meat packing plants, including those represented by Local 3 at Cedar Rapids, Iowa (App. 1027-1049). This contract would have terminated August 11, 1948, unless renewed (App. 1047). The contract also contained a provision permitting a reopening on wages during the period from August 11, 1947 to August 11, 1948 (App. 1047).

On December 19, 1947, the International notified the Company in writing that it wished to reopen the contract on the question of a general wage increase (App. 1055-1056).

Wage negotiations reached an impasse and the International and the Locals called a strike on March 16, 1948, nearly five months before the expiration date of the contract, and subsequent to the effective date of the Labor Management Relations Act of 1947 (App. 629). The strike continued approximately twelve weeks (App. 250, 992).

Proceedings Before the Board.

Charges were filed by several Locals, including Local 3, late in 1948 and early in 1949 (R. 4-49), alleging that the Company had refused to reinstate certain individuals after the strike and had discharged certain other individuals in violation of the Act (R. 60; App. 1003). On June 27, 1952, almost four years after the original charges were filed, the National Labor Relations Board (hereafter called "the Board") issued its complaint alleging that the Company

had violated Sections 8(a)(1) and 8(a)(3) of the Act (R. 52-55).

In its answer the Company denied the allegations of the complaint and pleaded that the strike was unlawful in violation of Section 8(d) of the Act, and that the individuals named in the complaint were discharged or denied reinstatement for unprotected activities. The answer also set forth various other affirmative defenses (R. 57-59).

The case was heard before a Trial Examiner of the Board who issued his Intermediate Report finding that the Company had violated Sections 8(a)(1) and 8(a)(3) of the Act as to all individuals named in the complaint (R. 94-131).

The Company filed exceptions to the Intermediate Report (R. 80-82), and on June 30, 1953 the Board issued its decision and order upholding the Trial Examiner's finding, except as to one individual (R. 83-93).

Proceedings in the Court of Appeals.

While petitioner filed a petition for review in the Court below under Section 10(f) of the Act as to the individual dismissed by the Board, no contention is made in the present petition with respect to this individual. The Company filed a petition for review of the Board's order in the Court below, under Section 10(f) of the Act, raising therein the defenses set forth in its answer to the Complaint, and in addition the further affirmative defenses that the Company had not been accorded a fair hearing, that certain rulings of the Trial Examiner were prejudicial to the Company, and that the findings of the Board were not supported by substantial evidence on the record considered as a whole (R. 135-142). Answers to both petitions were filed by the respective respondents (R. 143-147). The Board answered the Company's petition and requested enforcement of its order

(R. 145-147). Petitioner, Local 3, was permitted to intervene in the case arising on the Company's petition for the purpose of filing a brief (P. 4), and the two cases were consolidated for all purposes (R. 147-148).

On February 16, 1954 the Court below filed its opinion (P. 6-19), and on March 17, 1954 entered its decree refusing to enforce the Board's order and directing the Board to dismiss the proceedings (P. 20).

The Decision Below.

In its opinion the Court of Appeals set forth its several reasons for refusing to enforce the order of the Board (P. 6-19) as follows:

1. Based on the entire record, after having "examined the evidence bearing on * * * the cause of discharge or refusal to reinstate each of the employees named in the complaint" (P. 12), "the finding of the Board that the discharges and failures to reinstate the employees named in the complaint were because of their union activities" was "not sustained by substantial evidence" (P. 15).

In reaching this conclusion, the Court below considered, among other factors, the following:

(a) the failure to sustain the burden of proof which rested upon the Board to establish by substantial evidence "that the discharges or refusals to reinstate the employees involved were prompted by their union activities or affiliations" (P. 12);

(b) "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record" went "far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts" (P. 13);

(c) "The evidence considered as a whole, including all the surrounding facts and circumstances, convincingly established that the company had reasonable grounds to believe that the named employees had en-

gaged in the unprotected strike activities," and in reliance upon such belief justifiably refused to reinstate them (P. 15).

2. The strike before the expiration date of the contract between the Company and the Union was unlawful under Section 8(d) of the Act. As to the individuals involved, "by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the Company and hence, they were not entitled to re-employment as a matter of right" (P. 19).

ARGUMENT.

I.

Petitioner Has No Standing to Seek Review by This Court of the Decision and Decree of the Court Below.

The Board is the governmental agency charged by Congress with the enforcement of the Labor Management Relations Act in behalf of the public. "Congress has made the Board the only party entitled to enforce the Act." *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 27 (1952).

In the instant case the Board sought enforcement of its order in the Court below. However, the Board has now abandoned further enforcement proceedings with respect to such order inasmuch as it did not file a petition requesting review by this Court of the decision and decree below which denied enforcement of said order.

In seeking a writ of certiorari, despite the Board's failure so to do, petitioner is, in substance, attempting to enforce the Board's order contrary to the provisions of the Act as construed by this Court in *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261 (1940).

In the *Amalgamated Utility Workers* case, this Court rejected the proposition, apparently relied upon by the present petitioner, that the Act created private rights and provided for their enforcement in the courts. The petitioning union in that case had instituted a civil contempt proceeding against an employer for alleged failure to comply with a decree enforcing an order of the Board. After full review of the provisions of the Act, including Section 10(e) under which jurisdiction is claimed in the present

case, this Court affirmed the union's lack of standing to press such charges, stating:

> "When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. * * * the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order." (309 U. S. 261, 265-266.)

By its petition for a writ of certiorari in the instant case, petitioner endeavors to substitute itself for the Board in the ultimate enforcement of the Board's order. The decision in the *Amalgamated Utility Workers* case is controlling and compels the denial of the petition. Neither Section 10(e) of the Act, under which jurisdiction is sought to be invoked, nor any other provision confers authority on petitioner to enforce an order of the Board. Lacking such authority, petitioner is without standing to seek review in this Court of the decision and decree below denying enforcement of the Board's order.

It may be suggested by petitioner that its standing to seek review of the decision and decree below is supported by the decision of this Court in *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335 (1945). While the petitioning union in that case obtained review by this Court even though the Board had elected not to seek such review, the case may be readily distinguished. The petitioning union was there attempting to "contest" or overturn an order of the Board. Authority so to do is conferred upon any aggrieved party by Section 10(f) of the Act. In the instant case it is entirely clear that petitioner does not seek, by its petition, to contest or overturn an order of the Board. Indeed, petitioner makes no claim in the petition that it is an aggrieved party entitled to review under Section 10(f) of the Act. To the contrary, peti-

tioner's ultimate objective in this proceeding is enforcement of the Board's order under Section 10(e) of the Act.[2]

Since petitioner, in the circumstances of the instant case, has no standing to seek review by this Court of the decision and decree of the Court below, the petition for a writ of certiorari should be denied.

II.

The Decision and Decree of the Court Below Is Based Upon a Review of the Whole Record.

By its questions 2(a), 2(b) and 3[3], petitioner attempts to present for review several separate and independent issues upon which it apparently contends the decision of

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2. In the *Amalgamated Utility Workers* case, this Court stated with respect to these two sources of authority for reviewing orders of the Board as follows:

"* * * Petitioner emphasizes the opportunity afforded to private persons by § 10(f). But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part the relief sought. That is, it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it. The procedure on such a contest before the Circuit Court of Appeals is assimilated to that provided in § 10(e) when the Board seeks an enforcement of its order. But that assimilation does not change the nature of the proceeding under § 10(f), which seeks not to require compliance with the Board's order but to overturn it." (309 U. S. 261, 266.)

3. These questions are as follows:

"2. When an employer is charged with an unfair labor practice, under Section 8(a)(1) and (3) of the Act, for refusal to reinstate unreplaced strikers after a strike—

(a) is it a valid defense that the employer believed that the strikers had engaged in misconduct;

(b) must the Board show that the denial of reinstatement was 'for the purpose of discouraging membership in the union'?

"3. Does a trial examiner's uniform acceptance of the testimony for the strikers and uniform rejection of the testimony for the employer prove his 'bias and hostility' and vitiate his findings?" (Pet. 2.)

the Court below may be based.[4] Respondent respectfully submits that such analysis is in error. As heretofore shown, *supra*, page 5, the decision below is based on the Court's careful review of the whole record from which it ultimately concluded that the Board's findings are not supported by substantial evidence. The alleged separate and independent issues which petitioner attempts to present are merely subsidiary findings arrived at by the Court below in reaching its ultimate conclusion.

It is apparent that the review of the record by the Court below was in accordance with the mandate of this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951). In fact, the decision below quotes from that case (P. 14).

In its review, the Court below considered, as it had the duty to do, that "* * * the burden of proof to establish affirmatively by substantial evidence that the discharges or refusals to reinstate were because of union membership and activities and for the purpose of discouraging membership in the union was upon the Board and this burden at no time shifted to the company." (P. 12.)

The Court below "examined the evidence bearing on this question of the cause of discharge or refusal to reinstate each of the employees named in the complaint." (P. 12.) Thus it followed the procedures described by this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951), since it "painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary

4. This is done despite the contention of petitioner, appearing on page 7 of the petition, that the decision of the Court below is based solely on Section 8(d) of the Act, although conceding it is possible to read the opinion as "also resting on other grounds." The Section 8(d) issue is considered hereinafter at pages 14 *et seq.*

inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence."

This, in and of itself, is sufficient reason for denying certiorari. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498 (1951).

Petitioner's question 2(a) (see footnote (3) *supra*) suggests its belief that the Court below may have based its decision on the proposition that the employees involved were discharged or refused reinstatement by the Company solely in reliance upon a reasonable belief that they had engaged in unprotected strike activities (P. 15). Petitioner then argues that such ruling is in conflict with decisions of other Courts of Appeals. Discussion of this alleged issue is deemed unnecessary inasmuch as it is obvious from the very words of the Court below that its consideration of this point was not a basis for its decision. In fact, the Court expressly stated: "But quite aside from any proof produced by the company, a consideration of the record as a whole, in our judgment, fails to disclose any substantial evidence that the employees listed in the complaint were either discharged or refused reinstatement because of their union activities." (P. 15.)

Inasmuch as the finding of the Court below on this point was not the basis for its ultimate decision, it is obvious that the alleged issue does not, in fact, present a real and embarrassing conflict of opinion between the Courts of Appeals (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502) to warrant the granting of a writ of certiorari.

By its question 2(b) (see footnote (3) *supra*) and supporting argument, petitioner suggests that the statement of the Court below concerning the burden of proof on the Board to establish "by substantial evidence" that the al-

leged discrimination was "for the purpose of discouraging membership in the union" (P. 12) is in conflict with the decision of this Court in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17 (1954). This contention is without merit. While this Court in the *Radio Officers' Union* case did decide that "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3)", (347 U. S. 17, 74 S. Ct. 323, 338), this conclusion followed an earlier finding that the motivation of the employer has been consistently recognized as relevant under both Section 8(a)-(3) and its predecessor (347 U. S. 17, 74 S. Ct. 323, 337).

This Court also stated: "That Congress intended the employer's purpose in discriminating to be controlling is clear" (347 U. S. 17, 74 S. Ct. 323, 337). The proposition was further explained by Mr. Justice Frankfurter in a concurring opinion:

> "In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration" (347 U. S. 17, 74 S. Ct. 323, 344).

The Court below applied the principles enunciated in the *Radio Officers' Union* case when it concluded:

> "There was no direct evidence that the acts of the company complained of were prompted by the union activities of the employees *nor are there any proven facts warranting such inference*, and mere suspicion or conjecture can not be accepted as substantial evidence." (P. 15—emphasis added.)

Clearly this alleged issue affords no basis for the granting of a writ of certiorari.

Petitioner in its Question 3 (see footnote (3) *supra*) has attempted to create an issue that the Court below made a finding of bias and hostility on the part of the Trial Examiner based solely upon the action of the Examiner in accepting uniformly the testimony for the strikers and rejecting uniformly the testimony for the employer.

While the finding of the Court below with respect to the bias and prejudice of the Board's Trial Examiner is well warranted by the record, said finding is in any event merely subsidiary to the ultimate conclusion of the Court that the Board's findings and order were not supported by substantial evidence.

The bias and prejudice of the Trial Examiner convinced the Court below that it could not presume the correctness of the trier of facts but had to examine the entire record for itself. Thus it stated: "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts" (P. 13).

Petitioner in phrasing its Question 3 (see footnote (3) *supra*) apparently contends that the Court below based the finding of bias and prejudice solely upon "uniform acceptance of the testimony for the strikers and uniform rejection of the testimony for the employer." That this is not a fair appraisal is readily seen from a reading of the opinion below. The full text of the Court's statement is as follows, with the material omitted by petitioner in stating its Question 3 underlined:

> "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility." (P. 12.)

The Court below went on to say:

> "A study of the entire record indicates that this bias and hostility prevails not only in the weighing of the evidence but in the ruling of the court in rejecting pertinent evidence offered by the company." (P. 13.)

Thus a reading of the opinion in full context reveals that the Court below did not rely solely upon uniform acceptance of strikers' testimony and uniform rejection of Company evidence. There is no conflict of the decision below with *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656 (1949).

The alleged question raised by petitioner presents no basis for the issuance of a writ of certiorari.

It is pertinent to observe that the alleged issues discussed above were apparently of insufficient importance from the standpoint of the public to motivate the Board to seek certiorari in this case.

III.

The Court Below Correctly Interpreted Section 8(d) of the Labor Management Relations Act.

Petitioner has assumed that the principal basis for the decision of the Court below is Section 8(d) of the Labor Management Relations Act of 1947 (Pet. 5). It then argues that the decision on this issue is "probably incorrect" and is of such major importance as to warrant review by this Court.

Respondent has demonstrated that, after reviewing the entire record, the Court of Appeals rested its decision upon the absence of substantial evidence to support the Board's findings. It is equally clear that the Court's interpretation of Section 8(d) of the Act is correct, and that this issue does not, in any event, warrant review by this Court.

The collective bargaining agreement entered into on December 20, 1946 between the Company and the United Packinghouse Workers of America was, by its own terms, to have remained in effect until at least August 11, 1948 (App. 1047). On March 16, 1948, subsequent to the effective date of the Act and approximately five months prior to the expiration date of said agreement, the unions and the individuals here involved went out on strike to enforce their demands for a general wage increase (App. 629).

The Court below held that "by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the company and hence, they were not entitled to re-employment as a matter of right" (P. 19).[5]

The provisions of Section 8(d) are set forth in the Appendix to this Brief. The Section clearly requires any party to a collective bargaining agreement who desires to terminate or modify same, to continue such contract "in full force and effect, without resorting to strike or lockout" for a period of sixty days after notice "or until the expiration date of such contract, whichever occurs later."

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5. This has also been determined as a matter of law by the United States District Court for the Northern District of Illinois, Eastern Division, in a proceeding involving the very contract, the very unions and the very strike here involved. In *United Packinghouse Workers of America, et al.* v. *Wilson & Co., Inc.*, 80 F. Supp. 563, 569 (1948), the Court stated with respect to said issue that:

> "* * * the complaint shows on its face that plaintiffs, by 'resorting to a strike' on March 16, 1948 and before the 'expiration date of such contract', have violated the express mandate of Section 8(d) of the Labor Management Relations Act of 1947. Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof. Contracts, however express, cannot fetter the constitutional authority of Congress. *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 307, 55 S. Ct. 407, 79 L. Ed. 885, 95 A. L. R. 1352."

The date which "occurs later" in this case was the expiration date of the contract, or August 11, 1948. It is thus immediately obvious that the unions were required by law to continue their collective bargaining agreement with the Company "in full force and effect without resorting to strike" until at least August 11, 1948. They violated this express Congressional mandate by striking on March 16, 1948.[6]

In an effort to ascribe major importance to the decision of the Court below, petitioner argues that said decision "* * * in effect writes into every collective bargaining agreement a no-strike clause for the duration of the agreement" (Pet. 9). Petitioner then argues that a number of collective bargaining agreements presently in effect do not prohibit strikes for their duration, and, consequently, will be affected by the decision of the Court below interpreting Section 8(d).

The fact that many collective bargaining agreements may not expressly prohibit strikes during their terms cannot possibly be of consequence in determining the meaning of the plain and unambiguous words of Section 8(d). Even petitioner concedes that Section 8(d)(4) is "susceptible of the interpretation given it by the Court below: that is the literal interpretation" (Pet. 11). Petitioner, however, seeks to accomplish a change in the requirements of the Section by judicial interpretation. As observed by the Court below, if the requirements of the Section are to be altered, arguments such as urged by petitioner should properly be, and apparently have been, addressed to the Congress (P. 17).

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6. To the extent that resort to legislative history is deemed desirable in the proper interpretation of the Section, "despite the plain wording of the statute", the Court below has convincingly demonstrated that such history in fact supports its interpretation (P. 17-18).

Petitioner relies upon the decision of the Board in *United Packinghouse Workers of America, CIO, and Wilson & Co.*, 89 NLRB 310 (1950), in support of its suggested interpretation of Section 8(d). The language quoted from that opinion appearing on page 13 of the petition is sufficient to demonstrate that the Board reached its decision on the basis of what it thought the law should be, rather than on the basis of the statute as actually enacted by Congress. Moreover, it is appropriate to observe that, despite the Board's decision referred to, the present Board has not petitioned for a writ of certiorari to review the contrary interpretation of Section 8(d) by the Court below.

The Section 8(d) issue clearly lacks such public importance as to warrant the granting of a writ of certiorari.

CONCLUSION.

For the reasons stated herein, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to

agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed

as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

* * * * *

Sec. 10(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or

neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding,

certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.